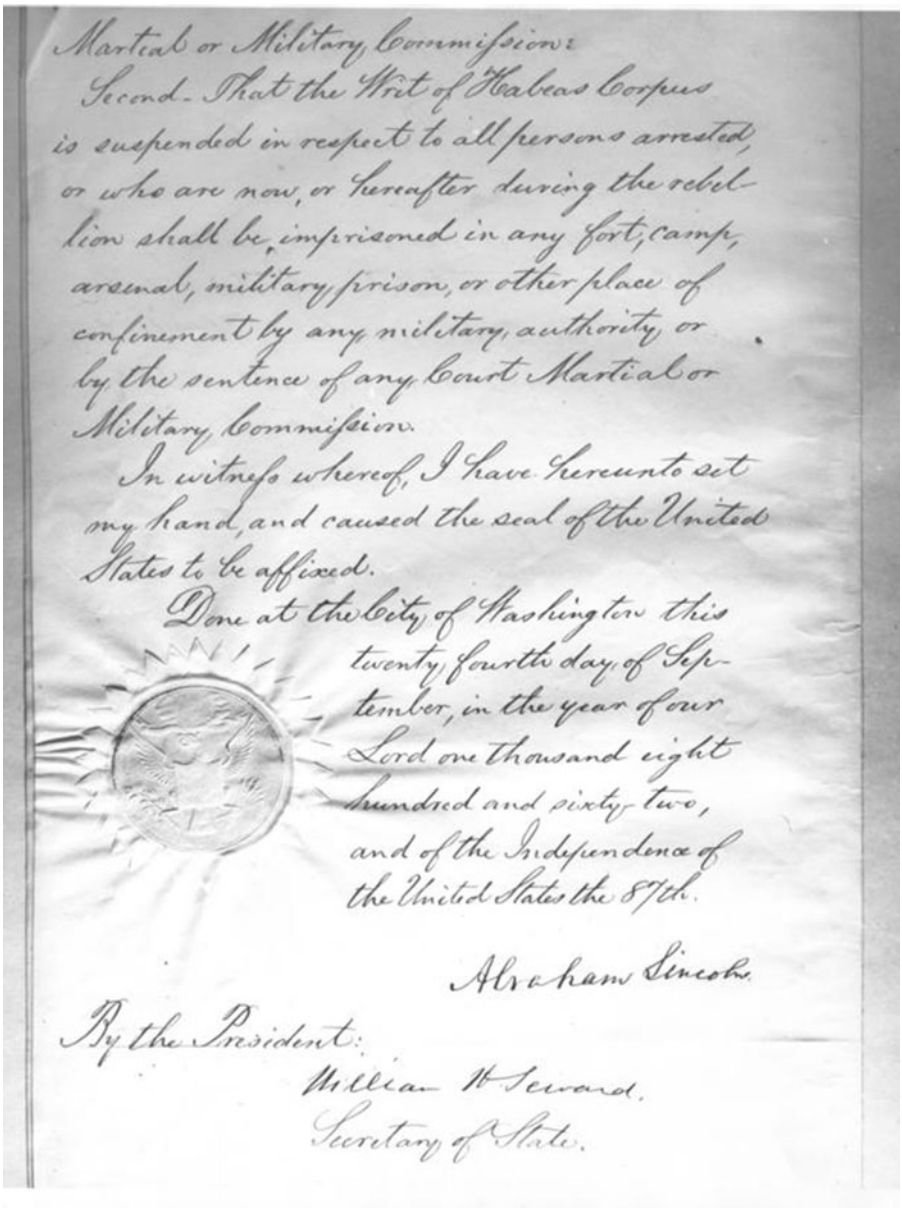
THE POWER OF HABEAS CORPUS IN AMERICA

Despite its mystique as the greatest Anglo-American legal protection, habeas corpus provides a history featuring opportunistic power plays, political hypocrisy, ad hoc jurisprudence, and many failures in effectively securing individual liberty. *The Power of Habeas Corpus in America* tells the story of the writ from medieval England to modern America, crediting the rocky history to the writ's very nature as a government power. The book weighs in on habeas's historical controversies – addressing its origins, the relationship between king and parliament, the U.S. Constitution's Suspension Clause, the writ's role in the power struggle between the federal government and the states, and the proper scope of federal habeas for state prisoners and for wartime detainees from the Civil War and World War II to the War on Terror. The concluding chapters stress the importance of liberty and detention policy in making the writ more than a tool of power. Taken as a whole, the book presents a more nuanced and critical view of the writ's history, showing the dark side of this most revered judicial power.

Anthony Gregory is a Research Fellow for The Independent Institute. His articles have appeared in *The Independent Review* and the *Journal of Libertarian Studies* and have been translated into multiple languages, reprinted in textbooks, and used in college courses on law and political science.



Martial or Military Commission:

Second - That the Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any Court Martial or Military Commission.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty fourth day of September, in the year of our Lord one thousand eight hundred and sixty two, and of the Independence of the United States the 87th.

Abraham Lincoln

By the President:

William H. Seward,
Secretary of State.

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FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR

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Foreword by Kevin R. C. Gutzman

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Of course, any errors or lapses in judgment are purely the author's responsibility.

Foreword

Ask any American what his most important right is, and he is apt to mention the freedom of speech, the freedom of the press, or the freedom of religion. Also much esteemed are the right to vote, the right to keep and bear arms, and various aspects of privacy.

Very rare is the person who would respond by saying, "The right not to be arrested and jailed arbitrarily," let alone mention the judicial writ that protects that right: the writ of habeas corpus. Lawyers know it as "the Great Writ," and the myth holds that its availability from time immemorial is the chief reason that Anglophones have long been free.

Anthony Gregory here does the estimable service of showing that the Great Writ was not always what we now understand it to be. He also lays out in excruciating, nay shocking, detail the 150-year trend, accelerating in our day, of reducing the writ's importance.

The story begins in medieval England, with the birth of several forms of writ of habeas corpus. Most readers will be surprised to learn that in the beginning, the writ's purpose was not to protect individuals from unjust detention. Rather, the writ began as an instrument for assertion of some courts' superiority over other courts. Individual Englishmen's claims had little role in that story.

In time, however, the writ was transmogrified into a mechanism for limiting royal power to detain. Eventually, it formed the germ of the American Patriots' writ of habeas corpus.

The U.S. Constitution says in Article I, Section 9, Clause 2 that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." Gregory's book demonstrates, among other things, that this provision raises more questions than it answers.

For example, whose writ? No other clause of the Constitution expressly empowers a federal court to issue such a writ. Indeed, the Constitution does not require that there be any federal courts other than the Supreme Court, and suits for writ of

habeas corpus are not among the types of suits over which the Constitution grants the Supreme Court original jurisdiction.

Perhaps the Framers contemplated federal suspension of state writs of habeas corpus. Here we encounter one of the forgotten realities of eighteenth- and nineteenth-century American legal practice: that it was chiefly state courts that issued writs of habeas corpus, even to federal executive officials.

Thus, for example, it was Northern state legislatures that adopted personal liberty laws to interfere with the implementation of arguably unconstitutional due process–denying provisions of the Fugitive Slave Act of 1850. In republican America, habeas corpus was originally a pre-trial mechanism usually employed by state courts. The federal government began asserting habeas corpus power against state authority with Andrew Jackson's Force Bill of 1833. (We should note that the only Senate "nay" vote on that bill came from John Tyler of Virginia, who quit Jackson's Democratic Party immediately thereafter, and who ultimately would earn some liberty-minded scholars' respect as the best president in American history.[1]) This trend accelerated with the Supreme Court's decision *Tarble's Case* in 1871, where the Court through one of its most eminent justices said that state courts could no longer issue writs of habeas corpus to federal officials.

Of course, contemporary interest in the relatively arcane writ of habeas corpus grew mainly out of the policies of the George W. Bush administration in pursuit of its War on Terror. Anthony Gregory's account of the writ's fate in Osama bin Laden's war is by turns infuriating and distressing.

Within days of September 11, 2001, Congress passed an Authorization for the Use of Military Force (AUMF). The AUMF gave a congressional imprimatur to presidential use of force against participants in the September 11 attacks and their aiders and abettors.

Famously, Bush pushed the argument that the president as commander in chief of the armed forces had various foreign policy–making powers not directly related to leading the military in execution of Congress's policies. In time, he also took so liberal an approach to the AUMF as to find in it authority for ignoring statutory provisions saying who could be held, what procedural protections they must be given, where they could be held, and how they could be interrogated in pursuit of the War on Terror.

One of the chief casualties of this general approach was the writ of habeas corpus. Bush's subordinates, like absolutist English Stuart kings of the seventeenth century, repeatedly argued on his behalf that various people did not have a right of access to the writ, and they copied the Stuarts in responding to judicial orders to comply with the writ in certain overseas jails (such as at Guantánamo Bay, Cuba) by moving captives to different overseas jails.

[1] Ivan Eland, *Recarving Rushmore: Ranking the Presidents on Peace, Prosperity, and Liberty* (Oakland, CA: The Independent Institute, 2009).

The roots of conservative contempt for the writ lie in the Warren Court's abuse of habeas corpus, which Gregory describes. Today's lawyers are yesterday's law students who grew up in the law studying the invention of unhistorical "rights" by federal judges in the 1950s, 1960s, and 1970s. Since Richard Nixon's 1968 presidential campaign, distrust of liberal judges has formed a key component in the right's criticism of the modern liberal state. Gregory's account, while not forthrightly critical of Warren Court excesses in this regard, makes clear why they provoked a backlash. So widespread has acceptance of the critique become that triangulating Democratic president Bill Clinton signed the Anti-Terrorism and Effective Death Penalty Act into effect. That legislation seriously abridged Americans' access to the writ.

First state courts lost their power to review federal detention; then federal judges' abuse of the writ led the elected branches to curb federal judges' power to issue the writ; and finally came the War on Terror Executive Branch's contempt for due process and the writ of habeas corpus. Perhaps most disappointing, though hardly surprising, in Gregory's account, is the abject failure of President Barack Obama to live up to his campaign criticisms of the Bush administration in this area.

Gregory concludes the story with a perfectly sensible suggestion: that Americans return to the original understanding of the writ of habeas corpus – which made it a key state check on federal power – and make federal judges' accustomed unwillingness to use the writ against federal officials less significant by abolishing the huge prison complex administered by today's federal government.

He concedes that achieving this goal would require nothing less than changing the American culture generally. If American governments imprison a higher proportion of their fellow citizens than any other government on earth, this is no accident.

Ultimately, politicians in the United States respond to elective pressure. As Pogo said, "We have met the enemy, and he is us." In "the land of the free, and the home of the brave," the flag still waves, but the people's pulse no longer beats in time with the Fathers'.

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